Atrium Plaza Health Care Center, Inc. *and* New England Health Care Employees Union, District 1199, AFL–CIO. Case 34–CA–6551–3

May 25, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND TRUESDALE

On January 13, 1995, Administrative Law Judge Lowell Goerlich issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

We agree with the judge that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing each employee's existing anniversary date, thereby altering and eliminating vacation and sick leave benefits that were preserved by the collective-bargaining agreement the Respondent had signed with the Union.

The Respondent operates a nursing home facility. In early February 1994, the Respondent, a successor employer, entered into a memorandum of agreement with the Union in connection with the Respondent's acquisition of the facility. The agreement expressly stated that terms of an expired contract between the Union and a predecessor employer, Winthrop Health Care Center (Winthrop), shall ''remain in effect'' except as specifically modified.[1] The Union-Winthrop contract provided that each employee's anniversary date shall be used for vacation purposes and that the vacation eligibility year ''shall be as heretofore.'' The Union-Respondent agreement did not modify these terms.

Following the execution of its agreement with the Union, the Respondent announced that all employees would have a new common anniversary date: February 8, 1994. There is no factual dispute that this was a new anniversary date that changed each employee's existing anniversary date. The practical effect of this new anniversary date was that employees would not be eligible for vacation time until they reached the next common annual anniversary date, that accumulated deferred vacation time based on these previous individual anniversary dates would be eliminated,[2] and that previously accrued sick leave entitlement would be eliminated and future sick leave eligibility changed to reflect the new anniversary date.

Although a successor employer ordinarily is free to set the initial terms on which it will hire the employees of a predecessor employer (except when it is ''perfectly clear'' that the new employer plans to retain all of the employees in the unit), *NLRB v. Burns Security Services*, 406 U.S. 272, 294–295 (1972), the Respondent here consulted with the Union instead of unilaterally fixing initial terms, and it negotiated a bargaining agreement governing employees' terms and conditions of employment. It is axiomatic that, once a bargaining agreement is executed, the terms of that agreement, as well as any other established conditions of employment that may have existed, may not thereafter be altered unilaterally. The Respondent, however, did precisely that, altering unilaterally each employee's existing anniversary date. It did so even though it had agreed to contractual terms providing that each employee's vacation eligibility year ''shall be as heretofore,'' that each employee's anniversary date shall be used for vacation purposes, and that sick leave and vacation benefit terms shall ''remain in effect'' except as specifically modified.

In these circumstances, we agree with the judge that the Respondent implemented unilateral changes in violation of Section 8(a)(5) and (1) of the Act. See *Bonnell/Tredegar Industries*, 313 NLRB 789 (1994), enfd. 46 F.3d 339 (4th Cir. 1995) (plain meaning of contractual provision that bonus plan ''shall remain in full force and effect'' means that plan, and all its integral parts, shall remain unchanged); *Kirby's Restaurant*, 295 NLRB 897, 900–901 (1989) (successor employer violated Section 8(a)(5) and (1) by unilaterally eliminating seniority credit earned during employment with predecessor employers for purposes of determining vacation pay entitlement); *Jersey Juniors, Inc*., 230 NLRB 329, 334 (1977) (successor employer must bargain with union before unilaterally withholding pension benefit contributions).[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Atrium Plaza Health Care Center, Inc., Hartford, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] In October 1993, Winthrop was placed into receivership.

[2] We note that Union Representative Leslie Frane testified without contradiction that the Union previously had agreed to defer vacation leave at the request of the Winthrop receiver, with the express understanding that such leave would be rescheduled subsequently. Accordingly, as a factual matter, it appears that the receiver effectively granted an extension of time for the scheduling of vacations. The Respondent does not contend otherwise.

[3] We find no merit to the Respondent's contention that the General Counsel failed to establish the appropriateness of the bargaining units alleged in the complaint. As the judge found, the units found appropriate are consistent with the units agreed to by the parties in their memorandum of agreement.

successors, and assigns, shall take the action set forth in the Order.

Thomas E. Quigley, Esq., for the General Counsel.
Robert J. Dinerstein, Esq., of Commack, New York, for the Respondent.
Leslie Frane, of New Haven, Connecticut, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LOWELL GOERLICH, Administrative Law Judge. The charge filed in this proceeding by the New England Health Care Employees Union, District 1199, AFL–CIO (the Union), on April 6, 1994,[1] was served on Atrium Plaza Health Care Center, Inc. (the Respondent), on April 7, 1994. An amended charge filed by the Union on May 13, 1994, was served on the Respondent on May 16, 1994. A second amended charge filed by the Union on June 30, 1994, was served on the Respondent on June 17, 1994. A complaint and notice of hearing was issued on July 19, 1994.

Among other things in the complaint it was alleged that the Respondent about February 7, 1994, eliminated accrued sick leave and vacation time benefits for employees and about February 17, 1994, changed the ''anniversary dates'' for employees without affording the Union an opportunity to bargain with Respondent with respect to this conduct, all in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

The Respondent filed an answer denying that it had engaged in any of the violations alleged.

The matter came on for hearing in Hartford, Connecticut, on October 12, 1994. Each party was afforded a full opportunity to be heard, to call, to examine and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions, and to file briefs. All briefs have been carefully considered.

On the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT, CONCLUSIONS, AND REASONS THEREFOR

I. THE BUSINESS OF THE RESPONDENT

At all material times, the Respondent has operated a nursing home in New Haven, Connecticut. Respondent admits that it is engaged in commerce within the meaning of the Act.

II. THE LABOR ASSOCIATION INVOLVED

At all times material, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES ALLEGED

Facts: A labor agreement existed between Winthrop Health Care Center, Inc. and New England Health Care Employees Union, District 1199, SEIU/AFL–CIO which expired on December 11, 1992. The agreement covered certain units of employees of the nursing home which is the subject of this action. Thereafter a strike ensued from April 2, 1993, until October 1993 ''at which time the strikers returned to work under agreement that was approved by the State of Connecticut, which at that point had stepped into—with a receiver by the name of John Quigley to operate under trusteeship, a receivership period.''[2] (Tr. 7.)

> The receivership was dissolved upon the sale of the home, that was an express part of that agreement with the State and the sale of the home took place in February of this year and Mr. Wolcowitz, who's the owner of Atrium Plaza, assumed operations of the home at that period of time.

The Respondent assumed operations of the home on February 7, 1994. On or around February 10, 1994, employees were told by Joan McSherry, director of nurses, that ''their anniversary dates were being changed.'' On February 17, 1994, without consulting with the Union the Respondent addressed a letter to all employees from Louis Wolcowitz, president, as follows:

> I am looking forward to the opportunity of meeting and working with all employees. We have great plans for Atrium Plaza, which I am sure you will be part of.
>
> As you will notice you are being paid with two checks this week. The Winthrop Health Care Center, Inc. check is for Sunday and Monday, and the first check of Atrium Plaza Health Care Center, Inc., which is for Thursday through Saturday. *February 8, 1994, will be considered your anniversary date for your employment of Atrium Plaza Health Care Center, Inc.* [G.C. Exh. 3, emphasis added.]
>
> On February 18th a group of roughly 45 employees and I [Leslie Frane, Union organizer] went to see administrator, Joan Lyke, to ask what this memorandum meant vis-a-vis accrued vacation and sick leave. And she informed us that we had no accrued vacation or sick time and that which we had earned had been erased from the books. [Tr. 33.]

In the above-mentioned labor agreement between the Union and Winthrop Health Care Center, in article XIV, section 2, it is stated, ''The employee's eligibility year shall be as here to fore. Each employee's anniversary date shall be used for vacation purposes.'' In respect to sick leave article XV, section 1(a), provides: ''Employees after thirty (30) days of employment, shall be entitled to earn sick leave as follows: . . . . Effective 12/12/87, five-sixths (5/6) of a day per month to a maximum of ten (10) days a year. . . . (c) Sick leave shall be noncumulative and unused sick leave shall be paid for by the Center on the Anniversary date of each employee.'' (Jt. Exh. 1, pp. 22–23.)

On February 7 and 9, 1994, the Respondent and the Union respectively signed a memorandum of agreement which re-

[1] All dates are 1994 unless otherwise indicated.

[2] The Union and the receiver, with court approval, agreed to a contract of 1 year's duration effective as of October 3, 1993. It was provided that the ''contract shall end and be null and void immediately upon sale of the facility to a new owner.'' The contract included substantially all terms and conditions of the contract in effect between the Union and Winthrop Health Care Center. This contract is referred to herein as the ''interim contract.''

cited ''All terms, conditions, and language included in the expired agreement between District 1199 and Winthrop Health Care Center dated Dec. 12, 1969 to Dec 11, 1992 *remain in effect*, except as modified.'' (Emphasis added.) Various modifications were appended to the agreement, one of which was a redefinition of the unit. Vacation and sick pay were not addressed. Provisions in respect to these remained the same except in article XVII ''Paid Leave'' was modified. ''Unpaid Leave. Family leave up to one year to care for infant, sick child, spouse, or parent.''

According to Frane, whose testimony on this point is uncontested, the only full negotiation for the agreement took place around the last week of January or the first week of February at the Hilton in Bridgeport. Present were Union Vice President Kevin Doyle, Frane, a negotiating committee of 15 employees, Wolcowitz, and an attorney. In addition there were a number of phone and informal discussions. ''[The contract was not] settled that day, it was settled after further discussion between the Employer's counsel and the Vice President of the Union, but the basis of it was agreed to at that meeting.'' (Tr. 27.) There is no credible proof[3] that the Respondent proposed or raised the issue that accrued vacation and sick leave benefits would be eliminated as of that date the Respondent took over or that the employees' anniversary dates would be changed. ''It was discussed that the contract would be accepted with modifications as negotiated.'' (Tr. 28.)

Frane explained without contradiction:

> As regard to vacation, employee's [sic] accrued a certain amount of vacation time per year—that the rate they accrued varied based on their seniority.[4] They were—the vacation time was placed on the books as the accrued it during the course of the year, but they weren't not entitled to use it until their anniversary. . . . It was the anniversary of their date of hire at the facility. . . . As regards to sick time, the accrual rate was the same for all employees and it was ten twelfths of a day per month and they were available to us it—the following—month after-it had been accrued.

If Respondent, Attorney Richard Case, is to be believed the Respondent was aware of the sick leave and vacation obligations under the labor agreement which it signed. In any event in that the Respondent (the contract not having been modified in respect to sick leave and vacations) agreed that the contract, as to its sick leave and vacation provision ''Remain in effect,'' contemplates an uninterrrupted continuance of the agreement's terms.

After February 17, 1994, employee grievances were filed on February 22, 1994. The Respondent has never answered the grievances.

Conclusions and Reasons Therefor

The parties signed an agreement which provided that the contract between the Union and Winthrop Health Care Center ''remain in effect except as modified.'' Thus the question in this case is: Can the Respondent under these circumstances unilaterally change a condition of employment for employees established under the agreement without bargaining with the Union, a party to the agreement?

The credible evidence establishes that the Respondent changed the anniversary dates for the employment of its employees (a mandatory subject of bargaining) without giving the Union an opportunity to bargain with the Respondent in respect to this conduct. A change in anniversary dates not only affected vacation and sick leave but also seniority, eligibility for benefits, layoff, recall, and uniform longevity.[5] Moreover, there is no credible evidence that the Union waived bargaining over this matter or any credible evidence that the Union accepted the agreement subject to the Respondent's release from vacation or sick pay liabilities[6] under the agreement.

Thus, the Respondent's change in the anniversary dates of employment for its employees altering the contractual terms which remained in effect and effecting employees' working conditions without affording the Union an opportunity to bargain with the Respondent was a violation of Section 8(a)(1) and (5) of the Act. Since the Respondent's refusal to honor the vacation and sick leave obligation accruing under the agreement is inextricably related to the change in anniversary dates, the Respondent's insistance on denying employees accrued vacation and sick leave benefits is also a violation of Section 8(a)(1) and (5) of the Act.

The credited record is void of any intent on the part of the parties that the agreement (except where modified) was not to remain as set forth in the agreement between the Union and Winthrop Health Care Center, Inc., including the provisions in respect to accrued vacation and sick leave benefits.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and it will effectuate the purposes of the Act for jurisdiction to be exercised here.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union has been at all times material the exclusive bargaining representative in appropriate units[7] for the pur-

[3] Wolcowitz who participated in the discussions did not appear as a witness.

[4] In a modification to the contract the parties agreed ''An employee's seniority shall commence upon successful completion of the probationary period, and shall be retroactive to the Employee's most recent date of hire.'' (Jt. Exh. 3, p. 9.)

[5] For example the agreement provides: after continuance employment of 5 years an employee receives 3 weeks' vacation, after 8 years, 4 weeks' vacation. ''Each employees' *anniversary date* shall be used for vacation purposes.'' (Emphasis added.)

[6] The fact that the Union may have claims against a predecessor is immaterial. See *Consolidated Coal Co.*, 307 NLRB 69, 72 (1992).

> The Respondent's contentions completely miss the thrust of this proceeding. This is a complaint by the Regional Director for the Board under the provisions of the National Labor Relations Act and it stands independent of any rights of the Charging Party to pursue other legal remedies. Respondent's plea could have some relevancy at the compliance stage in this proceeding, but it has no bearing at all on the question presented by the complaint which is directed at the issue of whether Respondent violated the Act.

[7] The parties agreed on the following appropriate units in the extention of the agreement above mentioned which I find appropriate. The Home (the Respondent) recognizes the Union as the sole and exclusive bargaining agent for all full-time and all part-time

poses of collective bargaining within the meaning of Section 9(a) of the Act.

4. By unilaterally making changes in its employees' wages, hours, working conditions, or other conditions of employment concerning mandatory subjects of bargaining without bargaining collectively with the Union in accordance with Section 8(a)(5) and (1) of the Act, the Respondent violated Section 8(a)(1) and (5) of the Act.

5. The above violations of the Act are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that the Respondent has engaged in certain unfair labor practices, it is recommended that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

It is further recommended that the Respondent restore the status quo ante of all unilateral changes and reimburse employees for any losses incurred by reason of the changes.[8]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Atrium Plaza Health Care Center, Inc., New Haven, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist

(a) Unilaterally changing the anniversary dates of employment of its employees without affording the Union an opportunity to bargain with the Respondent in respect thereto in the appropriate units.

(b) In any like or related manner interferring with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reinstate the status quo ante as it existed prior to the unilateral change in the anniversary dates of the employment of employees in the appropriate units and rescind such action taken.

(b) Restore to employees any losses they may have incurred by reason of the unilateral change as more fully set forth in the remedy.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze any amount owing under this Order.

(d) Post at its New Haven, Connecticut establishment copies of the attached notice marked ''Appendix.''[10] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

---

service and maintenance employees including nurses' aides, second cooks, dietary aides, housekeeping aides, maintenance employees and physical therapy aides, bed makers, the current categories and any future new or changed job descriptions, within the service and maintenance unit. The Home further recognizes the Union as the sole and exclusive bargaining agent for licensed practical nurses, technical employees, repiratory therapists, ward secretaries, recreation employees, central supply attendants, and all professional employees including registered nurses and head/charge nurses employed by the Employer at its New Haven, Connecticut facility, but excluding the infection control coordinator, quality assurance coordinator, OBRA coordinator, inservice coordinator, resident care plan coordinator and all other employees, guards, and supervisors as defined in the Act. Excluded from each of the aforesaid bargaining units are supervisory, confidential, executive and managerial employees, physicians, dentists, office clerical employees, students whose performance of work at the Employer is a part of the educational course of study such students are pursuing, part-time service and maintenance employees who work a total of one-fifth (1/5) of the regular full-time workweek or less for the job classification in which they work, temporary employees as defined herein, and such other employees as are listed as excluded in the stipulations hereunto annexed.

[8] See *Porta-King Building Systems*, 310 NLRB 539 (1993). ''Indeed, in cases involving unlawful unilateral changes, the Board's normal remedy is to order restoration of the status quo ante as a means to ensure meaningful bargaining.''

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unilaterally change the anniversary dates of employment of our employees without affording the New England Health Care Employees Union, District 1199, AFL–CIO an opportunity to bargain in respect thereto in the appropriate units.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL rescind our unilateral action and restore the status quo ante as it existed prior to our unilateral change which we made in the anniversary dates of employment of our employees in the appropriate unit by memorandum dated February 7, 1994.

WE WILL restore any losses plus interest to our employees who may have incurred losses by reason our unilateral change in the anniversary dates of employment of our employees.

ATRIUM PLAZA HEALTH CARE CENTER, INC.